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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MANUEL BENTA, JR., Defendant and Appellant.	C077767 (Super. Ct. No. 13F6464)

A jury convicted defendant Manuel Benta, Jr., of attempted murder and found it was willful, deliberate, and premeditated. (Pen. Code, §§ 664/187; count 1.)[1] In connection with count 1, the jury sustained allegations defendant intentionally and personally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)), and personally inflicted great bodily injury (§ 12022.7). The jury also convicted defendant of

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1 Undesignated statutory references are to the Penal Code.

arson of an inhabited structure (§ 451, subd. (b); count 2) and arson of property (§ 451, subd. (d); count 3). In connection with count 2, the jury sustained the allegation defendant used an accelerant to commit the arson. (§ 451.1, subd. (a).)

Sentenced to state prison, defendant appeals. He contends the trial court prejudicially erred in refusing his pinpoint instruction on provocation and insufficient evidence supports the jury's finding that he used an accelerant. We affirm the judgment.

FACTS

Horace Randazzo met defendant through work in 2006. They became friends and went fishing together. In 2008, Randazzo had to quit working after having a heart attack. By 2011, he had lost contact with defendant who left work to go to school. In September 2013, Randazzo rented a house in the City of Shasta Lake. Shortly thereafter, he saw defendant who explained he was getting a divorce from his spouse who lived near Randazzo. Between 2006 and 2013, Randazzo met defendant's spouse five or six times. Defendant accepted Randazzo's invitation to live in Randazzo's house and defendant helped put up a wall for a second bedroom.

On the morning of October 2, 2013, Randazzo's vehicle had been towed to a repair shop, so defendant gave Charlotte Pisano, Randazzo's girlfriend, a ride to another part of town. Defendant returned 30 minutes to an hour later. Randazzo was in the bathroom, washing his hands at the sink. Defendant approached Randazzo and shot him in the back without warning. When Randazzo turned around, he saw defendant with a semiautomatic gun that appeared jammed and asked defendant, "What in the hell are you doing?" Defendant responded, "I know you're running away with my wife after you pick up [the] car and that's not gonna happen." Randazzo replied, "What the hell are you talking about?" Randazzo also replied he had no interest in defendant's spouse. Defendant aimed at Randazzo's head and Randazzo raised his right hand. Defendant fired the gun and the bullet hit Randazzo's hand. Defendant left, closing the bathroom door behind him. Randazzo locked the bathroom door and called 911 on his cell phone.

Defendant mumbled something to Randazzo through the door. Shortly thereafter, Randazzo saw smoke coming under the bathroom door. Randazzo was fearful defendant was still in the house so he did not open the door. Instead, he tried unsuccessfully to open the bathroom window. He broke the window with the handle of a toilet plunger and yelled for help. Some people outside helped him get out of the house. Randazzo was transported to the hospital where he remained for five to seven days and had surgery on his hand. He faced one to three more surgeries on his hand. The bullet remained in his back.

Prior to the day of the shooting, Randazzo heard a tape recording possessed by defendant. Randazzo disagreed with defendant's interpretation of the recording as that of defendant's spouse having sexual intercourse. Randazzo claimed all he heard was some rustling leaves.

An officer who interviewed Randazzo at the hospital testified Randazzo mentioned defendant's spouse had come by the house at 8:15 a.m. that day, but did not come inside. Randazzo also stated, after he had been shot in the back, defendant said, "Why are you screwing my wife?" and, "I know you're screwing my wife. You guys are going to run away with the money."

Defendant surrendered to the police not far from the burning house. When interviewed by the police, defendant admitted shooting Randazzo twice and would have continued to shoot but ran out of bullets. Defendant also admitted he set Randazzo's house on fire with an accelerant. A recording of the interview was played for the jury. Defendant obtained the gun he used to shoot Randazzo from his spouse's garage, and then set a fire in her garage. Defendant thought his spouse and Randazzo were having an affair and that Randazzo had been drugging him. Defendant claimed to have seen paperwork which suggested to him Randazzo had plane tickets. Defendant claimed his spouse had stopped by Randazzo's house at 7:30 or 8:00 a.m. that morning on her way to work. Defendant spoke with her and then confronted Randazzo, accusing him of being a

law enforcement officer and making him (defendant) believe he was under house arrest. Randazzo denied it but defendant shot him anyway. Defendant looked for an accelerant and "popped . . . open" a "couple of accelerant cans" to set the house on fire. Defendant did not testify at trial.

Defendant's clothing was retrieved immediately after the crime. According to a criminalist, the presence of methyl ethyl ketone, a solvent (used as a cleaner and in lacquer thinners), was detected on defendant's clothing. The substance is an ignitable liquid, readily started on fire, and could be used as an accelerant. At Randazzo's house, an aerosol can (a can of oven cleaner) used as an accelerant was found hidden in a pile of towels, clothing and rags, in front of a sofa in the living room, an area which had the most fire damage. A trail of paint in the house did not burn. According to the fire investigator, the house overall had moderate fire damage.

A pile of burned items and clothing were found in the detached garage of the home of defendant's spouse. The structure had smoke damage throughout. Packed bags were found inside her house.

DISCUSSION

I

Defendant contends the trial court prejudicially erred in refusing to give his special instruction which further defined provocation. He argues the special instruction pinpointed his defense. We conclude the trial court did not err in refusing the special instruction.

Background

Over the prosecutor's objection, the trial court instructed the jury in the language of CALCRIM No. 603, which instructed the jury the crime of attempted murder was reduced to attempted voluntary manslaughter if committed in the heat of passion arising

from provocation.[2] Defendant sought, and the prosecutor opposed, an additional, special instruction which stated: "The provocation which incites the defendant to homicidal

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[2] The court instructed the jury in the language of CALCRIM No. 603 as follows:

"An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion.

"The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if: One, the defendant took at least one direct but ineffective step toward killing a person; two, the defendant intended to kill that person; three, the defendant attempted the killing because he was provoked; four, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from a passion rather than from judgment; and five, the attempted killing was a rash act done under the influence of intense emotional—of intense emotion that obscured the defendant's reasoning or judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It could be any violent or intense emotion that causes a person to act without due deliberation and reflection. In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it.

"Although no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It's not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient.

"In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment.

"If enough time passed between the provocation and the attempted killing for a person of average disposition to, quote, unquote, cool off and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result of sudden quarrel or in

conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim." The court refused to give the special instruction, concluding it was duplicative of CALCRIM No. 603, potentially confusing, and "maybe even not supported by substantial evidence."

Analysis

In reviewing a claim of instructional error, we determine the correctness of the instructions from the entire charge, rather than parts of an instruction or a particular instruction in isolation. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1177.)

Upon request, a defendant is entitled to an instruction that pinpoints the defense theory. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) A pinpoint instruction " 'relate[s] particular facts to a legal issue' " and " ' "pinpoint[s]" the crux of a defendant's case.' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) A trial court is not required to give a pinpoint instruction that is argumentative, duplicative, or not supported by the evidence. (*People v. Harris* (2013) 57 Cal.4th 804, 853; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99.)

"Manslaughter is a lesser included offense of murder. [Citations.] The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ' "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a

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the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder."

person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, [i.e., express or implied malice,] a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 (*Steele*).) " 'To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to "sufficient provocation." ' [Citation.]" (*Id.* at p. 1253.)

Here, there was no evidence that Randazzo, by words or conduct, provoked defendant. There was no evidence Randazzo admitted that he was having an affair with defendant's spouse or similar words or that Randazzo had been seen with defendant's spouse in compromising circumstances. Defendant had no reasonable basis to believe Randazzo was engaged in an affair with defendant's spouse. While defendant claimed he believed Randazzo was having an affair with defendant's spouse, "the circumstances giving rise to the heat of passion are also viewed objectively." (*Steele*, *supra*, 27 Cal.4th at p. 1252.) There was also no evidence Randazzo had set defendant up for an arrest. Although defendant claimed he believed Randazzo had set him up for an arrest, the

evidence did not establish the objective component of provocation necessary for conviction of attempted voluntary manslaughter. There was simply no evidence Randazzo had provoked defendant. Defendant appears to have acted on baseless assumptions in his own mind, which will not reduce attempted murder to attempted voluntary manslaughter.

The evidence did not show provocation but the trial court instructed the jury anyway on heat of passion attempted voluntary manslaughter. The trial court instructed the jury with CALCRIM No. 603, which explains that when the defendant attempts to kill another under a heat of passion arising from a provocation that would have caused a person of average disposition to act rashly with intense emotion, the attempted killing may constitute attempted voluntary manslaughter because the heat of passion negates the malice element required for murder. Notwithstanding the lack of evidence, defendant requested an additional pinpoint instruction: "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]" This language is from *People v. Lee* (1999) 20 Cal.4th 47 at page 59 (*Lee*) (see also *People v. Moye* (2009) 47 Cal.4th 537, 549-550). But this is only part of the heat of passion requirement and relates to the subjective component. *Lee* continues: "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*Lee*, *supra*, at p. 59.) This part relates to the objective component which was not included in defendant's requested additional pinpoint instruction and, as such, was argumentative and potentially confusing, as the trial court found, since the standard instruction included the objective component and the additional pinpoint did not.

Since no reasonable jury would have concluded defendant *reasonably* believed Randazzo provoked him, he was not entitled to an instruction on attempted voluntary

manslaughter, let alone a special instruction further defining provocation. "Thus, although the trial court instructed the jury on heat of passion voluntary manslaughter out of caution, it did not have to do so, as no evidence supported the instructions. Accordingly, the court did not have to give yet more instructions on the point. [Citation.]" (*Steele*, *supra*, 27 Cal.4th at pp. 1253-1254.)

Even if we were to assume the trial court should have given the additional special instruction concerning provocation, it would have been of no consequence because there was no prejudice. To determine the probability that the pinpoint instruction would have achieved a different outcome, we review the instructions given in this case. The instruction on attempted voluntary manslaughter provided, in relevant part, that "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment" and that "[t]he attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment." Further, the instruction on attempted murder provided "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." Any error from refusing the special instruction would be harmless since the jury was not precluded from finding adequate provocation from Randazzo. In determining the attempted murder was deliberate and premeditated, the jury decided the issue against defendant, which is not surprising since there was no evidence, when viewed objectively, Randazzo, by words or conduct, provoked defendant.

The trial court did not err in refusing the special instruction. Moreover, defendant's contention fails because he has not demonstrated prejudice. Even if his special instruction had been given, it is not reasonably probable he would have received a more favorable result.

II

Defendant contends insufficient evidence supports the jury's finding he used an accelerant to start the fire in Randazzo's house. We conclude sufficient evidence supports the finding.

In considering a sufficiency of the evidence claim, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant [used an accelerant] beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Defendant claimed he had looked for and found an accelerant to start the fire in Randazzo's house. Defendant admitted he "popped . . . open" a "couple of accelerant cans." Defendant's clothing which had been retrieved immediately after the offenses had the presence of methyl ethyl ketone, a solvent which could be used as an accelerant and which is an ignitable fluid. An aerosol can (a can of oven cleaner) used as an accelerant was found hidden in a pile of towels, clothing and rags, in front of a sofa in the living room, an area which had the most fire damage, and the house overall had moderate fire damage. Sufficient evidence supports the jury's finding that defendant used an accelerant.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

RENNER, J.